In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 886

DAVID E. ARMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on September 21, 1967, and its opinion (Pet. App. B) is reported at 384 F. 2d 51. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to November 20, 1967. An attempt was made to file a typewritten petition for a writ of certiorari on November 21, 1967, without payment of the docket fee. On December 2, 1967, a printed petition was filed and it was actually docketed on December 5, 1967. The petition is thus out of time under Rule 22–2 of the Rules of this Court. In any event, the petition raises no question warranting review by this Court.

Petitioner, along with six other individuals and the Commonwealth Securities Corporation, was charged in

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a thirty-count indictment returned in the Southern District of Ohio with the use of mails in a fraudulent scheme to sell securities (15 U.S.C. 77q), mail fraud (18 U.S.C. 1341) and a conspiracy to commit those offenses. After a jury trial, he was convicted on twenty-two counts and was sentenced to imprisonment for a total of fifteen years.

The evidence showed that petitioner was president and later chairman of the board of the Certified Credit Corporation. Between 1950 and 1962, this corporation acquired control of numerous corporations by stock purchases, mergers and the organization of new corporations. The stock issues of the new corporations were sold through the Commonwealth Securities Corporation, which was controlled by petitioner (Tr. 592, 705–706, 717, 1368). In all, including the sale of Certified Credit Corporation's own stock, the securities sold totalled $6,720,000 (Tr. 65–66).

In selling the various stocks issues, the Commonwealth salesmen used an annual report of the Certified Credit Corporation containing a consolidated balance sheet which fraudulently depicted a tremendous financial growth of the corporation (*e.g.*, Tr. 293, 698–699, 880–881). Thus, the consolidated balance sheet for 1961 showed cash and short term receivables of over $5,000,000, when the actual cash was $33,000 and the receivables had no factual basis (Tr. 392–399, 551). In fact, the Certified Credit Corporation never made an operating profit (Tr. 400), and some of the new corporations did no business except to sell their stock and place the funds in Certified Credit Corporation (*e.g.*, Tr. 28, 39, 46).

1. Of the six other individual defendants, two pleaded guilty before trial and testified as government witnesses (Tr. 375, 573), and another defendant was not tried because of ill health and old age. At the conclusion of the testimony of the first government witness, two other defendants pleaded guilty outside the presence of the jury (Tr. 288). The court thereafter admonished the jury that the disposition of the case against these two defendants should not be considered as affecting in any way the guilt or innocence of the remaining defendants (Tr. 292). At the conclusion of the government's case, the court sustained the motion for a severance by the other individual defendant, Joseph DeVennish, and reserved its ruling on DeVennish's motion for judgment of acquittal (Tr. 969–971). It told the jury only that it had ruled that DeVennish should have a separate trial (Tr. 972).[1]

Petitioner was not prejudiced by the fact that he was the only individual defendant whose case was submitted to the jury. Neither at trial nor now does he point to specific evidence admissible solely against his codefendants which might have prejudiced him before the jury. Nor did the court abuse its discretion in refusing to delay the trial because of the illness of codefendant Chester Hathaway. Petitioner, who stated only that Hathaway was a material witness, did not specify what testimony he expected to elicit from Hathaway. He also did not request leave to take Hath-

[1] Five months after the verdict, the court sustained the motion of DeVennish for judgment of acquittal.

away's deposition under Rule 15 of the Federal Rules of Criminal Procedure.

The fact that two codefendants entered guilty pleas shortly after the trial commenced did not prejudice petitioner since the pleas were not taken in the presence of the jury. Nor is there basis for complaint in the fact that the trial court did not acquit his codefendant DeVennish during the trial and so inform the jury. The court did instruct the jury that petitioner could not be held criminally responsible for any actions that he took in a good-faith reliance on the advice of counsel, even if the advice was erroneous, provided he had made full disclosure of the facts to counsel (Tr. 1459–1460). This instruction clearly presented petitioner's defense of reliance on advice of counsel.[2]

2. Since the annual reports of the Certified Credit Corporation were at the heart of the fraudulent scheme and none was prepared for 1962, the S.E.C. analyst who examined the records of the Certified Credit Corporation and its subsidiaries prepared a complete financial analysis only through the year 1961 (Tr. 266–267, 319, 369–370). The witness was, however, able to testify to changes which occurred in 1962.[3] It

[2] There is no merit to the contention that the court of appeals had no authority to supplement the record with the original indictment, which refuted petitioner's argument on appeal that a valid signed indictment had not been returned by the grand jury.

[3] For example, after he stated that Certified Credit and Thrift Company of Ohio, a subsidiary formed in 1959, did little or no business, he testified that in 1962 it followed its prospectus and acquired an office building. He also said that it acquired the building from money which it had previously transferred to the parent corporation (Tr. 46–47, 262–265).

is clear, therefore, that the government did not suppress any testimony favorable to the defense. Moreover, petitioner was not precluded from obtaining his own analyst to examine the records.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968